(1) Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIAM G. McANDREW,

Petitioner,

v.

STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT),

Respondent.

On Petition For Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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74 pp

QUESTION PRESENTED

Was Petitioner denied due process of law when the Department of Community Affairs sent him a furlough notice advising that he was being dismissed because his "position will not be funded," and then, without amending that notice, proceeded to establish a totally different basis for dismissal at the hearing before the Civil Service Commission, where the Civil Service Commission's own Management Directive required that advance written notice of the reason for dismissal be given?

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PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Petitioner William G. McAndrew respectfully petitions for a Writ of Certiorari to review the judgment of the Commonwealth Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Commonwealth Court dated June 29, 1999 (2a-12a) is reported at 736 A.2d 26 (Pa. Cmwlth. 1999). The underlying opinion of the Pennsylvania Civil Service Commission is unreported. (20a-33a).

JURISDICTION

The Commonwealth Court entered its Judgment on June 29, 1999. (13a). The Pennsylvania Supreme Court initially granted Petitioner's Petition for Allowance of Appeal on December 13, 1999 (14a), heard oral argument on May 1, 2000, and then issued a subsequent Order on September 28, 2000, dismissing the appeal "as having been improvidently granted," to which Order two Justices filed a Dissenting Statement. (15a-18a). On January 3, 2001, the Pennsylvania Supreme Court issued an Order denying Petitioner's Application for Reargument. (19a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which states that " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case involves the Constitutional rights of a civil servant to receive an accurate, non-misleading notice of the reason for his dismissal, and a fair opportunity to challenge that employment decision.

A. Petitioner Was Denied Due Process

Petitioner William McAndrew ("McAndrew") began his employment with the Appointing Authority, the Pennsylvania Department of Community Affairs (hereinafter "DCA"), on April 13, 1978, at the age of 42. On April 1, 1982, he was given Civil Service status as a Weatherization Specialist 1. He was promoted to Weatherization Specialist 2 on September 12, 1988.

In March of 1995, the newly-elected Governor, Tom Ridge, announced that the DCA would be dismantled and its responsibilities distributed to other agencies. (22a). The DCA senior staff met with the Governor's Office of Administration and over the ensuing year the Office of Administration recommended that 90 of the approximately 190 DCA employees be furloughed, specifically including McAndrew, who was one of three Weatherization Specialists then in the State. (21a, 23a).

By letter dated May 28, 1996, Acting Secretary David Black of the DCA sent McAndrew a furlough notification letter which stated in pertinent part:

> The section of the proposed budget for fiscal year 1996-1997 relevant to the Department of Community Affairs, provides funding for one hundred positions. **Since there has been no funding proposed to support the current complement, your position will not be funded**. It is necessary to furlough you from your regular Civil Service Weatherization Specialist 2 position effective the close of business June 28, 1996. (50a) (emphasis added).

Petitioner McAndrew filed a timely appeal to the Pennsylvania Civil Service Commission, claiming that, contrary to the Secretary's letter, there were sufficient funds to support his position as Weatherization Specialist 2. A hearing was held on September 24, 1997. When Petitioner went to the hearing, he was prepared to address the issue of the Department's purported lack of funds, as stated in the furlough letter. As it turned out, it was not lack of funds, but lack of work which the DCA asserted and sought to prove as the basis for his furlough. (21a). Petitioner protested this switch at the time of the hearing, (25a), but to no avail.

On October 27, 1998, the Civil Service Commission denied Petitioner's appeal, ruling that the DCA proved that McAndrew was properly furloughed for "lack of work," which was not the reason stated in the furlough notice. (33a). Significantly, the Civil Service Commission's Management Directive 580.11, which has the force of law, provides that "notice to furloughee shall include job title

and civil service status **and shall state reason(s)** and the right of appeal . . . " (44a) (emphasis added).

A timely Petition For Review was filed with the Commonwealth Court, which affirmed the Adjudication of the Civil Service Commission on June 29, 1999. (2a-13a). Thereafter, the Pennsylvania Supreme Court granted McAndrew's Petition For Allowance of Appeal on December 19, 1999 (14a), and heard oral argument on Petitioner's appeal on May 1, 2000. Then, on September 28, 2000, the Pennsylvania Supreme Court inexplicably issued the following *per curiam* Order which, in effect, reversed its prior Order granting the Petition for Allowance of Appeal:

> "Appeal dismissed as having been improvidently granted." (15a).

Two justices of the Pennsylvania Supreme Court dissented, noting that the Petitioner did not receive due process of law in the form of meaningful notice. (16a-18a).

B. How the Federal Question Was Presented

When Petitioner learned, at the hearing before the Civil Service Commission, that the DCA intended to justify his furlough by presenting evidence of lack of work, not lack of funding, he argued that his due process rights were violated based upon, *inter alia*, the misleading and inaccurate notice letter, and the denial of a fair hearing due to lack of opportunity to present evidence and defend against the DCA's "lack of work" claim. (25a-27a).

Petitioner raised these same issues concerning violation of his procedural due process rights in his appeal to the Commonwealth Court of Pennsylvania. (4a).

REASONS FOR GRANTING THE PETITION

The issue in this case is simple. As Mr. Justice Cappy stated in his Dissenting Statement, "[O]ur system of dispute resolution rests upon the bedrock foundation that due process of law requires, *inter alia*, meaningful notice." (11a). Petitioner clearly was denied meaningful notice because the DCA notified him that he was being dismissed for lack of funding and then proceeded to establish a different basis for dismissal at the hearing before the Civil Service Commission. According to Mr. Justice Cappy, this "switch in time" deprived the Petitioner of the opportunity to provide relevant evidence regarding his dismissal. (17a).

I. The Commonwealth Court Violated Petitioner's Constitutional Right to Procedural Due Process When it Ignored Management Directive 580.11 and Held That the Stated Basis for Petitioner's Furlough – "Lack of Funds" – Need Not Be Proved by the Employer

It is undisputed that a civil servant, such as Petitioner, has a protected "property" interest in his job by virtue of his civil service status. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538-39, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985); *Short v. Lawrenceville*, 696 A.2d 1158 (Pa. 1997). Judge Palladino, writing for a unanimous

Commonwealth Court, aptly capsulized the rights of a tenured civil servant in Pennsylvania as follows:

> It is now firmly established that where a state legislative body creates by enactment a sector of public employment, it thereby confers a substantive property interest which is subject to procedural protections of the due process clause of the Fourteenth Amendment to the United States Constitution. *Williams v. City of Pittsburgh*, 531 A.2d 42, 45 (Pa. Cmwlth. 1987).

Indeed, the Commonwealth Court decision below acknowledged that the Pennsylvania Civil Service Act gives civil service employees an enforceable expectation of continued employment. (9a). It is axiomatic, therefore, that the State cannot deprive a civil servant of this property right without due process of law. *Loudermill*, 470 U.S. at 538, citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12, 98 S. Ct. 1554, 56 L.Ed.2d 30 (1978).

Here, the Petitioner received a furlough letter from the DCA (his State employer) which stated that he was being laid off for lack of funds – and the fact finder below, the Commission, so held: "In our opinion, the phrase 'your position will not be funded' indicates a lack of funding." (26a). Yet, at the hearing, the reason stated in the furlough letter was deemed irrelevant and the DCA was allowed by the hearing examiner to switch to proof of an entirely new ground theretofore specifically unstated to McAndrew – lack of work. McAndrew protested this switch at the hearing (25a) and preserved the issue throughout these proceedings.

On appeal, the Commonwealth Court held that there was no due process violation in allowing the DCA to

present testimony and evidence indicating that McAndrew was furloughed due to lack of work because "[t]here is no statute, regulation or case law that states that the specific reason for a furlough must be given to the employee." (9a-10a). The Commonwealth Court was wrong and its error deprived Petitioner of his Constitutional right to due process.

While the Civil Service Act, 71 P.S. §.741.950, and the Pennsylvania Code are silent on the issue of whether a furlough letter shall contain a statement of the reasons for a furlough, the Civil Service Commission's own Policy Management Directive 580.11 specifically mandates that in state departmental furloughs "notice to furloughee shall include job title and civil service status **and shall state reason(s)** and the right of appeal. . . . " (44a) (emphasis supplied). Moreover, the Pennsylvania Supreme Court has held that Civil Service Policy Management Directive 580 has the force of law. *Housing Authority of the County of Chester v. Pa. State Civil Service Commission*, 556 Pa. 621, 730 A.2d 935 (1999).

The Commonwealth Court totally ignored this Management Directive, which clearly was established to assure protection for the due process rights of civil servants such as Petitioner. The Commonwealth Court cited three of its own cases for holding that the furlough notice need not set forth the reason for the furlough. But the events in all three cited cases, *Marks v. State Civil Service Commission*, 299 A.2d 691 (Pa. Cmwlth. 1973), *Department of Public Welfare v. Magrath*, 321 A.2d 403 (Pa. Cmwlth. 1974) and *Eastern Pennsylvania Psychiatric Institute v. Russell, et al.*, 465 A.2d 1313 (Pa. Cmwlth. 1983), occurred before the **first** version of Policy Management Directive

580.11 took effect on September 24, 1981. Moreover, in each of those cases the furloughee was given a reason for his furlough, and, a careful reading shows that in none of those cases did the Court approve an unconstitutional switch at the hearing of the reason for the furlough.

It is well established "that Commonwealth agencies must follow their own regulations," particularly those established to implement constitutional protections. *Novak v. Commissioner Insurance Department*, 525 A.2d 1258, 1260 (Pa. Cmwlth. 1987). Upon judicial review, the Commonwealth Court should have reversed the order of the DCA "if it is not in accord with agency procedure . . . or if it is not in accordance with law." *Slawek v. State Bd Of Med. Educ. & Licensure*, 526 Pa. 316, 322, n.4, 586 A.2d 362, 365, n.4 (1991).

II. The Commonwealth Court's Decision Deprived Petitioner of His Procedural Due Process Right to Adequate Notice

This Court's pronouncement upon the requirements of due process could not be clearer:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case."

Loudermill, 470 U.S. at 542, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L.Ed. 865 (1950). In other words, the essential requirements of due process "are notice and an opportunity to respond." *Loudermill*, 470 U.S. at 546.

According to this Court, a tenured public employee, such as Petitioner, "is entitled to oral or **written notice of the charges against him, an explanation of the employer's evidence**, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546, citing *Arnett v. Kennedy*, 416 U.S. 134, 170-171, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974) (emphasis added). Indeed, the notice required by due process "should be reasonably calculated to inform interested parties of the pending action **and the information necessary to provide an opportunity to present objections**," *id.* (emphasis added); see *Parham v. Cortese*, 407 U.S. 67, 92 S. Ct. 1983 (1972) (where property interest is affected, due process requires **adequate notice** and fair opportunity to be heard in defense of that interest).

Thus, notice is one of, if not the most, basic requirements of due process. According to this Court: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified." *Goss v. Lopez*, 419 U.S. 565, 579, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975).

In the instant case, the Civil Service Commission's Management Directive 580.11 implements this basic tenet of due process by requiring that when a civil servant is furloughed, he or she must given the **"reason"** for the furlough. (44a). Petitioner contends that the procedural due process clause of the United States Constitution requires that this furlough "reason," at a minimum, be fair, accurate and not misleading.

According to this Court, to satisfy due process concerns, the notice must inform the recipient of what the

charges are "in a manner adequate to apprise the individual of the basis for the government's action." *Landon v. Plasencia*, 459 U.S. 21, 39, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982) (Justice Marshall Opinion, concurring in part, dissenting in part). In fact, in another case in the administrative context (involving termination of welfare benefits), this Court emphasized that the parties must be given "timely and adequate notice **detailing the reasons for a proposed termination**." *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970).

What becomes abundantly clear from these decisions is that fundamental fairness inherent in procedural due process requires in *all* cases that the government, whenever it gives a notice to a citizen who has a liberty or property interest at stake in a proceeding that would divest him or her of that liberty or property interest, make certain that the notice not be a **misleading** one; and further that it not be permitted to prove at the deprivation hearing a new and theretofore unstated reason or charge.

The general proposition of law on "misleading notice" which is applicable here was spelled out by the Seventh Circuit nearly 30 years ago. In a Department of Agriculture hearing on suspension of a livestock dealer's license, the Court held:

> In an administrative proceeding it is only necessary that the one proceeded against be reasonably apprised of issues in controversy, and **any such notice is adequate in the absence of a showing that a party was misled.**

Cella v. U.S., 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954) (emphasis supplied). The Fifth Circuit also agreed, holding "where the **notice** given to responding party **is not misleading** and apprises that party of the issues in controversy, the requirements of the law are met." *Intercontinental Industries, Inc. v. American Stock-Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972) (emphasis supplied).

The whole issue in this case is whether McAndrew had adequate notice of the true reason for his furlough so that he could defend effectively his due process protected property interest in his job. The Commonwealth Court suggests that McAndrew was afforded due process because he was aware of the lack of work reason, even though it was not stated to him in the furlough letter, because he was "aware of the impending dismantling of the DCA and that jobs would be eliminated as a result of this dismantling, through the Governor's announcement, the union and through general office awareness." (7a). However, a careful review of the adjudication by the Civil Service Commission shows that there are absolutely no findings to support these conclusions.

Furthermore, the Commonwealth Court cites no specific instances in the record where it can be said there is support for these conclusions. For example, it states that the Union received notice (7a), but the record fails to show what the Union received notice of, and, when, and, indeed, most importantly whether it communicated that information to McAndrew. The Court also alludes to the "Governor's announcement." (7a). Again, it is profoundly unclear how a public relations announcement of a proposed Departmental dismantling can be specific notice to McAndrew that he, McAndrew, would be one of the

people furloughed where only approximately 50% of the DCA were indeed furloughed, and, further, that he would be furloughed for lack of work – not for lack of funds – from a job the duties of which continue to be performed to this day.

The Commonwealth Court below also alludes to McAndrew's receiving adequate notice which would satisfy fundamental fairness from so-called "general office awareness." (7a). Again, how these vague, and, unspecific conclusions have any relevance in a due process context where a Constitutional right to adequate notice is required is mystifying. Petitioner does not deny he knew of upcoming furloughs. What he is claiming is that the notice that he had from his furlough letter and the circumstances surrounding it was that he was being laid off for lack of funds, not for lack of work.

The furlough notice letter misled McAndrew into thinking he was laid off for lack of funds. And, as noted, the Civil Service Commission held that his belief was reasonable as the letter to McAndrew clearly recited "lack of funding" as the reason for his dismissal. (26a). Any fair reading of the record shows that McAndrew discovered for the first time at the hearing that the real reason for his furlough was lack of work. (25a). The Commission found the DCA's stated reason for McAndrew's furlough was a lack of funds, and, McAndrew's view that he was laid off for a lack of funds "clearly reasonable." (26a). To hear the DCA argue that the notice provided McAndrew with a "reason" for his furlough as required by **Management Directive 580.11**, but that it was not the true reason for his furlough, is particularly offensive to the concept of due process.

The Commonwealth Court and the DCA did not cite a single instance where it can be reasonably and clearly said from the record of this case that McAndrew **personally** knew or had reason to know from the dismantlement process and his "placement form" that his impending layoff was **due to a lack** of work. Accordingly, the notice McAndrew received from the letter and the circumstances surrounding it was the same; he was laid off for lack of funds.

If this Court were to uphold the DCA's and the Commission's view, then the teaching of this case would be that it is fundamentally fair under due process that a tenured civil servant be given a **misleading** furlough notice where nothing reasonably surrounding the circumstances of the notice suggest the true nature of the furlough. This proposition has no support in the law, and, the DCA has never cited any, because the law is to the contrary. For this reason, the decision of the Commonwealth Court must be reversed.

III. Petitioner Was Denied the Opportunity to Put Forward Evidence in Defense of His Constitutionally Protected Property Right in His Civil Service Job

In *Loudermill*, this Court recognized that "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken, is a fundamental due process requirement." 470 U.S. at 546. The lack of adequate notice of the Commonwealth's new grounds for dismissal – lack of work – had the inevitable effect of denying Petitioner the second requirement of procedural due process – a fair hearing at which he could

put forward his case through informed cross-examination, documents and witnesses.

It cannot be said that the two reasons – lack of funds or lack of work – are so similar as to be easy for an employee to understand the real reason for his furlough, and, to prepare a defense for the hearing. The two present entirely different defense scenarios. For example, defending against a lack of funds furlough involves a review of budget materials and witnesses dealing with financial affairs. On the other hand, fighting against a furlough based upon lack of work involves a study of what efforts management made to determine there was a lack of work, what efforts were made to undergo a true reorganization and streamlining, and an inquiry into the good faith of management in arriving at its decision. The witnesses needed for such a hearing are not necessarily budget-oriented people, but rather are management analysts, and even union representatives.

If McAndrew had adequate notice of the lack of work issue, he would have been able to subpoena individuals, such as Union representatives, to show the lack of reliability and lack of credibility of the uncorroborated, non-expert opinion hearsay used to support the DCA's lack of work allegation. McAndrew was thus denied a fair opportunity to present evidence on a critical issue in his case, all because the notice he received as to the basis of the furlough was not the true reason for the furlough, and, he had absolutely no time to react during the hearing to get witnesses to refute the testimony of the DCA.

Credibility is also an important issue for the Commission to decide and it is regrettable that the Commission, because of the due process failures of the DCA, made decisions on credibility based upon a hearing record badly in need of supplementation. McAndrew in his Post-Hearing Brief sought to supplement the record with a host of important and relevant documents to counter the testimony, hearsay and uncorroborated speculation of the DCA witnesses. But the Commission refused to consider such evidence on the ground that it was sought to be introduced after the hearing when it could not be subject to oath and examination. (21a). This is precisely the harm perpetrated upon him by the lack of adequate notice as to the true basis of his furlough. He could not possibly have known what evidence to submit at the hearing when he was misled as to the true basis for his furlough.

To suggest, as the Commonwealth Court did, that Mr. McAndrew's current complaints are the result of his decision to proceed without an attorney is without merit. (10a-11a). Even if he were represented by counsel, it would have been too late even for the attorney to take any action, other than complain about the switch and to defend the case on the basis of the charge presented – lack of funds – all of which Mc Andrew himself did at the hearing. It must be kept in mind that the "switch in time" (as Mr. Justice Cappy characterized it) occurred halfway into the hearing process. To suggest that this out-of-work civil servant's failure to secure an attorney was the cause of his own problems, **despite what the Commonwealth formally told him**, offends notions of fundamental fairness. The actions of the Commonwealth DCA and the

Civil Service Commission deprived him of his rightful opportunity to effectively cross-examine witnesses, and, to gather witnesses and documents in a timely fashion in defense of his constitutional property right. Alerted as he was only in the middle of his hearing about the irrelevancy of Secretary Black's lack of funds furlough letter, and, the new ground of "lack of work through cost efficient reorganization," the unassisted, uncounselled McAndrew had no time to gather witnesses and documents.

His due process right to have a fair opportunity to be heard in defense of his constitutional property interest in his job was violated at virtually every turn by the DCA and the Hearing Examiner. The decision of the Commonwealth Court (erroneously holding that there was no rule or regulation requiring notice of the dismissal to be given – in obvious unawareness of the Management Directive) placed a seal of approval upon this violation of Petitioner's constitutional rights, and for this reason, must be reversed.

CONCLUSION

For the reasons stated herein, Petitioner McAndrew respectfully requests that this Honorable Court reverse the decision of the Commonwealth Court, and order his reinstatement.

Respectfully submitted,

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APPENDIX

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

WILLIAM G. McANDREW Petitioner	:	
v.	:	No. 3118 C. D. 1998
STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT), Respondent	:	

PER CURIAM ORDER

AND NOW, this 26th day of August, 1999, it is ORDERED that the above-captioned opinion filed June 29, 1999 shall be designated OPINION rather than MEMORANDUM OPINION and it shall be reported.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM G. McANDREW, Petitioner	:	No. 3118 C.D. 1998
	:	Argued: May 18, 1999
v.	:	
STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT), Respondent	:	

BEFORE:
HONORABLE JAMES R. KELLEY, Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE JESS S. JIULIANTE, Senior Judge

OPINION
BY JUDGE FLAHERTY FILED: June 29, 1999

William G. McAndrew (McAndrew) petitions for review from an order of the State Civil Service Commission (Commission) which dismissed his appeal challenging his furlough from employment as a Regular Weatherization Specialist 2 with the then existing Department of Community Affairs (DCA).[1] We affirm.

---

[1] The Department of Community and Economic Development (Department) has replaced the DCA and is now the respondent in this matter.

The following facts were found by the Commission. In March 1995, the Governor of Pennsylvania announced that the DCA would be dismantled and its responsibilities distributed to other agencies. The DCA's senior staff subsequently conducted a review to determine minimum staffing requirements. Based upon this review, the DCA concluded that a complement of approximately 100 positions would be sufficient to perform its program functions. The DCA concluded that there was no need for a Weatherization Specialist 2 at the Scranton Regional office because the Weatherization Specialist in Philadelphia could perform the job functions required. McAndrew was the only Weatherization Specialist 2 employed at the DCA's Scranton Regional office.

By letter dated Mary 28, 1996, McAndrew was informed that he was to be furloughed from his position as a Weatherization Specialist 2, regular status, effective at the close of business June 28, 1996. The letter stated, "The section of the proposed Commonwealth budget for fiscal year 1996-1997 relevant to the Department of Community Affairs, provides funding for one hundred positions. Since there has been no funding proposed to support the current complement, your position will not be funded."

McAndrew filed an appeal with the Commission challenging his furlough pursuant to Sections 951(a) and (b) of the Civil Service Act (Act).[2] His claims alleged that there were funds to support his position and that he was

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[2] Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.951(a) and (b).

furloughed because of discrimination based on age and political affiliation.[3] On September 24, 1997, McAndrew's appeal was heard before a hearing officer of the Commission. On October 27, 1998, the Commission issued an adjudication that dismissed both the 951(a) and (b) claims finding that credible evidence supported McAndrew's furlough based on lack of work and finding that McAndrew failed to meet his burden with respect to his age discrimination claim.[4] McAndrew then filed his petition for review with this court.

McAndrew raises four issues for this Court's review: (1) whether the Commission erred in concluding that he was furloughed for lack of work instead of the reason stated by the DCA in the furlough letter which McAndrew contends was Lack of funds; (2) whether his procedural due process rights were violated by the DCA's allegedly misleading furlough letter; (3) whether he was denied the opportunity to present testimony and evidence at the hearing because of the "switch" in the reason for the furlough; and (4) whether the Commission erred as a matter of law when it concluded that the DCA engaged in a good faith attempt to streamline its functions.[5]

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[3] McAndrew withdrew his political affiliation claim at his appeal hearing before the Commission and it is not before this Court.

[4] McAndrew does not challenge the finding and conclusion of the Commission regarding his claim of age discrimination on appeal, therefore, it is not before this Court.

[5] In reviewing a decision of the State Civil Service Commission this Court is limited to a determination of whether constitutional rights have been violated, errors of law have been

Before we address the merits of McAndrew's petition for review, we must first address the Department's motion to strike McAndrew's reply brief and McAndrew's answer to that motion. The Department argues that McAndrew's reply brief should be struck because it did not raise any new matter in its brief that McAndrew had not already raised in its brief and because McAndrew's reply brief merely rehashes matters presented in its initial brief. McAndrew responds that the Department did raise new matter in its brief and that the reply brief was the only opportunity it had to respond to these new matters and address alleged misstatements in the Department's brief.

Pa. R.A.P. 2113 provides that "an appellant may file a brief in reply to matters raised by appellee's brief not previously raised in appellant's brief. . . . " In our opinion, a review of the parties' briefs reveals that the Department did raise new matter in its brief to which McAndrew responded. However, McAndrew's brief does rehash issues previously argued in his initial brief. Nonetheless, because McAndrew's reply brief does address new matter raised by the Department, we decline to strike the brief. Accordingly, the Department's motion to strike the reply brief is denied.

The first issue raised by McAndrew is whether the Commission erred in concluding that he was furloughed for lack of work instead of the reason he contends was stated by the DCA in the furlough letter, which was lack

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committed, or whether necessary findings of fact are supported by substantial evidence. *Eastern Pennsylvania Psychiatric Institute v. Russell*, 465 A.2d 1313 (Pa. Cmwlth. 1983).

of funds. McAndrew argues that the Commission erred in allowing the Department to prove that he was furloughed for lack of work instead of lack of funds and that the Department should have only been permitted to prove that he was furloughed for lack of funds. The Department counters that there was no error since a furlough letter need not set forth any reason for the furlough as long as it adequately informs the employee of the fact that he will be furloughed. Moreover, the Department argues that McAndrew was well aware of the Governor's announcement and the resulting review of the DCA to determine what positions could be eliminated, since the Union was involved and there was a great deal of publicity and general office awareness.

A furlough is defined by Section 3(s) of the Act as "a termination of employment because of lack of funds or of work."[6] Where there has been called into question the validity of a furlough, the appointing authority has the burden to establish a prima facie case justifying the furlough, *i.e.* that the furlough resulted from a lack of funds or a lack work. *Department of State v. Stecher*, 506 Pa. 203, 484 A.2d 755 (1984).

This Court held in *Marks v. State Civil Service Commission*, 299 A.2d 691 (Pa. Cmwlth. 1973), in *Department of Public Welfare v. Magrath*, 321 A.2d 402 (Pa. Cmwlth. 1974) and again in *Eastern Pennsylvania Psychiatric Institute*, 465 A.2d at 1313, that in the case of a furlough action, the written notice required under Section 950 of the Act need

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[6] 71 P.S. § 741.3(s).

not set forth reasons for the furlough. The notice is sufficient if it adequately informs the employee of the fact that he will be furloughed.[7] Here, McAndrew was adequately informed that he was being furloughed. A furlough can occur for only two reasons, lack of funds or lack of work. The record indicates that McAndrew was aware of the impending dismantling of the DCA and that jobs would be eliminated as a result of this dismantling, through the Governor's announcement, the Union and through general office awareness. Clearly, McAndrew was aware that jobs were being eliminated and there would be a lack of work.

McAndrew would have us hold that if a furlough letter indicates that a person is being furloughed for lack of funds, then the appointing authority is precluded from providing prima facie evidence that the employee was furloughed for lack of work, or vice versa. He cites *McClelland v. State Civil Service Commission*, 322 A.2d 133 (Pa. Cmwlth. 1974) and 4 Pa. Code § 105.15(a) in support of his argument.

McClelland involves a civil service employee being dismissed for cause, it does not involve the furlough of an employee. The employer cited two different reasons or charges for the employee's dismissal in the dismissal letter, but at the hearing before the Commission, the employer presented other reasons for the dismissal. This

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[7] We also note that the Civil Service Commission's regulations governing personnel actions, such as furloughs, does not require that the notice of the furlough include a statement of reasons for the furlough. *See* 4 Pa. Code §§ 105.2 and 105.3.

Court held that because the employee had adequate notice of only the two charges listed in the dismissal letter, it was a violation of the employee's due process rights to allow testimony concerning other charges or reasons for dismissal. The Court noted in its decision that 4 Pa. Code § 105.15(a) imposes upon the appointing authority the duty to go forward to establish the charges upon which its personnel action is based in order to establish a prima facie case in justification for its action.

We must conclude that our decision in *McClelland* is not applicable in cases such as the one before us now where an employee has been furloughed. First, 4 Pa. Code § 105.2 and § 105.3 do not direct the appointing authority to provide reasons for a furlough. The regulation does direct the appointing authority to list charges or reasons in the case of a dismissal. Because there is no regulation or case law that requires reasons to be given in a furlough letter, the appointing authority cannot then be required to only present testimony and evidence on the "charges" or reasons outlined in the furlough letter. In addition, because there can only be two reasons for a furlough, an employee is on notice that he or she is being furloughed due to lack of funds or work. In the case of a dismissal, there could be an infinite number of reasons for the dismissal, necessitating the regulation requiring that the employee be notified of the reasons for the dismissal.

Accordingly, we cannot conclude that the Commission erred in allowing the Department to present testimony and evidence indicating that McAndrew was furloughed due to lack of work.

McAndrew next argues that his procedural due process rights were violated by the Department's misleading furlough letter because he was not given adequate notice of the reason for his furlough in the letter. Procedural due process requirements apply only when one is deprived of an interest encompassed within the Fourteenth Amendment protections of the Constitution, such as liberty or property rights. *Sasko v. Charleroi Area School District,* 550 A.2d 296 (Pa. Cmwlth. 1988). McAndrew argues that he had liberty and property rights in his employment by virtue of the Civil Service Act. He cites *Pivarnik v. Department of Transportation,* 474 A.2d 732 (Pa. Cmwlth. 1984) in support of his position.

Pivarmik states that a property right exists in public employment where the employee has an enforceable expectation of continued employment and that such enforceable expectation is present only if the employee, by statute or contract, has been granted some form of guarantee. *Id.* at 734. In Pennsylvania, public employees gain an enforceable expectation of continued employment in their jobs through legislative action. *Id.* at 734. We must agree with McAndrew that according to *Pivarnik,* the Civil Service Act does give civil service employees an enforceable expectation of continued employment. Therefore, we must examine whether McAndrew's procedural due process rights were violated in this case.

Due process has been defined as that which is reasonably calculated to inform interested parties of the pending action and the information necessary to provide an opportunity to present objections. *Pennsylvania Coal Mining Association v. Insurance Department,* 471 Pa. 437, 370 A.2d 685 (1977). McAndrew was afforded due process

when he was given the letter informing him of the furlough. There is no statute, regulation or case law that states that the specific reason for a furlough must be given to the employee. By statute there can only be two reasons for a furlough, lack of funds or lack of work. Here, McAndrew was aware of the impending dismantling of the DCA and that jobs would be eliminated due to this dismantling through various means. Moreover, the furlough letter stated that the upcoming funding would only provide for one hundred positions to be maintained. Logically, this would mean that jobs were being eliminated. Because the record indicates that McAndrew was aware of the impending dismantling and job eliminations, we cannot conclude that his procedural due process rights were violated in any way by the furlough letter.

Next, McAndrew argues that he was denied the opportunity to present testimony and evidence at the hearing because of what he terms the "switch" in the reason for his furlough. He alleges that he was denied the opportunity to put forth evidence concerning the lack of work reason for his furlough. A review of the record does not reveal that McAndrew was, at any point during the hearing, denied the opportunity to present testimony or evidence or cross-examine witnesses by asking relevant questions.

As pointed out by the Commission in its decision, McAndrew chose to appear at the hearing without benefit of legal counsel. The record indicates that he was informed of his right to legal counsel and that he would have the opportunity to cross-examine witnesses, examine documents, and make objections, as well as provide testimony and evidence on his on [sic] behalf. The record

reveals that he was provided these opportunities. During the hearing he did not request a continuance due to his alleged "surprise" in order to better prepare by gathering more evidence, nor did he request subpoenas for witnesses to rebut testimony and evidence concerning the lack of work situation. These were avenues available to McAndrew at that time. As cogently stated by the Pennsylvania Supreme Court, "Any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing." *Vann v. Unemployment Compensation Board of Review,* 508 Pa. 139, 494 A.2d 1081 (1985). Unfortunately for McAndrew, we cannot conclude that he was denied the opportunity at the hearing to put forth evidence on his behalf.

Finally, McAndrew argues that the Commission erred as matter of law when it concluded that the DCA engaged in a good faith attempt to streamline its functions. We must disagree with McAndrew.

A reading of his brief reveals that McAndrew does not argue or cite any case law that would support an argument that the Department's evidence did not legally support a finding of a good faith attempt to streamline its functions. Instead, his argument is more similar to one concerning substantial evidence and it attacks the credibility of the Department's witnesses and their testimony. In addition, he argues that his testimony and the testimony he could have offered are more credible and show that there was no good faith effort on the part of the DCA to streamline its functions.

It is well settled that the Commission has the inherent power to determine the credibility of witnesses and the value of their testimony. *Stover v. Department of Environmental Resources*, 636 A.2d 1275 (Pa. Cmwlth. 1994). Based upon the testimony of the Department's witnesses, the Commission found that the Department had met its burden of proving lack of work justifying McAndrew's furlough. In making its findings, the Commission must base the findings upon substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. *Id.* at 1277. Our review of the record indicates that the Commission's findings were based upon substantial evidence in the record, therefore, its conclusion that Department met its burden of proving the lack of work to justify the furlough is not in error.

Accordingly, based upon the reasons cited above, the order of the Commission upholding the furlough of McAndrew by the DCA is affirmed.

/s/ Jim Flaherty
JIM FLAHERTY, Judge

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

WILLIAM G. McANDREW Petitioner	:	
v.	:	No. 3118 C. D. 1998
STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT), Respondent	:	

ORDER

AND NOW, this 29th day of June, 1999, the order of the State Civil Service Commission at number 19485, mailed October 27, 1998, is affirmed. In addition, Respondent's motion to strike Petitioner's reply brief is denied.

/s/ Jim Flaherty
JIM FLAHERTY, Judge

IN THE SUPREME COURT
OF PENNSYLVANIA
MIDDLE DISTRICT

WILLIAM McANDREW Petitioner	:	No. 757 Middle District Allocatur Docket 1999
v.	:	
STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT), Respondent	:	Petition for Allowance of Appeal from the Commonwealth Court

ORDER

PER CURIAM:

AND NOW, this 13th day of December, 1999, the Petition for Allowance of Appeal is hereby granted.

[J-68 OF 2000]
IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

WILLIAM G. McANDREW Appellant v. STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT), Appellee	)	No. 262 M. D. Appeal Docket 1999 Appeal from the Order of the Commonwealth Court entered June 29, 1999, at No. 3118 C.D. 1998, Affirming the Order of the State Civil Service Commission mailed October 27, 1998, at No. 19485 Argued: May 1, 2000

ORDER

PER CURIAM: DECIDED: September 28, 2000

Appeal dismissed as having been improvidently granted.

Mr. Justice Cappy files a dissenting statement in which Mr. Justice Nigro joins.

JUDGMENT ENTERED:
September 28, 2000

/s/ Shirley Bailey
Shirley Bailey,
Chief Clerk

[J-68-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

WILLIAM G. McANDREW, Appellant	No. 262 M.D. Appeal Dkt. 1999
v.	
STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT), Appellee	Appeal from the order and opinion of the Commonwealth Court at No. 3118 C.D. 1998 dated June 29, 1999 affirming the order of the State Civil Service Commission at No. 19485 dated October 27, 1998.
	Argued: May 1, 2000

DISSENTING STATEMENT

MR. JUSTICE CAPPY DECIDED: September 28, 2000

The majority has chosen to dismiss this matter as improvidently granted. I respectfully dissent from that decision.

Our system of dispute resolution rests upon the bedrock foundation that due process of law requires, *inter alia*, meaningful notice. One reason for this elementary requirement of meaningful notice is that justice is best served when both parties are apprised of the issues involved in a case so that they may be fully prepared to advocate their side of the dispute and to educate the tribunal about the matter. Without meaningful notice of

the points at issue, an adjudication would devolve into nothing more than trial by ambush.

Appellant William McAndrew was denied meaningful notice in this case. Mr. McAndrew, a fourteen-year civil servant, received a furlough notice from the Department of Community Affairs advising him that he was being dismissed because his "position will not be funded." At the hearing before the State Civil Service Commission, Mr. McAndrew was prepared to contest his furlough on the Department's stated reason of a lack of funding. However, without amending its reason for furlough prior to the hearing, the Department proceeded on a different basis for dismissal before the Commission. Specifically, at the hearing the Department contended that Mr. McAndrew was furloughed due to lack of work.

This "switch in time" deprived Mr. McAndrew of the opportunity to challenge the Department's actions and provide the Commission with relevant evidence regarding his furlough for lack of work. Of greater import, the notice was in violation of the clear and unambiguous terms of the Commission's own Policy Management Directive that requires a notice to a furloughed employee to include, *inter alia*, the reason for the furlough. Policy Directive 580.11; *cf. Housing Authority of the County of Chester v. State Civil Service Commission*, 730 A.2d 935 (Pa. 1999) (policy directive has same force of law as regulation).

As Mr. McAndrew was denied an opportunity to refute the Department's newly offered reason for furlough and because the Commission disregarded its

own legally biding directive, I respectfully dissent and would reverse the order of the Commonwealth Court.

Mr. Justice Nigro joins this dissenting statement.

[J-68-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

WILLIAM G. MCANDREW, Appellant	:	No. 262 MAP 1999 Application for Reargument
v.	:	
STATE CIVIL SERVICE COMMISSION (DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT), Appellee	:	

ORDER

PER CURIAM:

AND NOW, this 3rd day of January 2001, the application for reargument is denied.

COMMONWEALTH OF PENNSYLVANIA

William G. McAndrew	)	State Civil
	)	Service Commission
v.	)	
	)	
Department of	)	
Community Affairs	)	Appeal No. 19485

William T. Jones	George A. Michak
Attorney for Appellant	and Lori K. Irwin
	Attorneys for Appointing Authority

ADJUDICATION

This is an appeal by William G. McAndrew challenging his furlough from regular Weatherization Specialist 2 employment with the Department of Community Affairs. A hearing was held September 24, 1997, in the Strawberry Square Complex, in Harrisburg, Pennsylvania, before Hearing Officer Lynne M. Mountz

FINDINGS OF FACT

1. By letter dated May 28, 1996, the appellant was furloughed from his position as Weatherization Specialist 2, regular status, effective at the close of business June 28, 1996. Comm. Ex. A.

2. The appeal was properly raised before this Commission and was heard under Sections 951(a) and (b) of the Civil Service Act, as amended.

3. In March 1995, the Governor announced that the appointing authority agency would be

dismantled and its responsibilities distributed to other agencies. N.T. pp. 28-29. The appointing authority's senior staff subsequently conducted a review to determine minimum staffing requirements. N.T. pp. 36-38, 90-92.

4. Based upon its review, the appointing authority concluded that a complement of approximately 100 positions would be sufficient to perform its program functions. N.T. pp. 37, 90-91.

5. The appointing authority concluded that there was no need for a Weatherization Specialist at its Scranton Regional Office. N.T. pp. 41-42. Appellant was the only Weatherization Specialist 2 employed at the appointing authority's Scranton Regional Office. N.T. p. 217.

The Notes of Testimony have been reviewed by all the Commissioners, together with the exhibits introduced at the hearing. We also have read the briefs submitted by the parties.[1]

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[1] The Commission hereby notes that we have not reviewed the "Supplemental Exhibits" included with the post-hearing briefs submitted by the appointing authority and the appellant and included with the appointing authority's reply brief. The appointing authority's argument in opposition to appellant's inclusion of "Supplemental Exhibits" with his brief (AA Reply Bf. pp. 14-20), is just as applicable to the appointing authority's attempts to similarly supplement *both* its initial Brief and its Reply Brief. These documents, although clearly intended to address substantive issues relevant to the hearing, were not submitted for review and cross-examination at that time. Accordingly, we hereby refuse to accept either party's

By letter of May 28, 1996, the appointing authority advised appellant of his furlough from regular Weatherization Specialist 2 employment effective the close of business June 28, 1996. Comm. Ex. A. In an appeal challenging furlough, the burden lies with the appointing authority to establish a valid lack of funds or lack of work to justify the furlough. *County of Beaver, Beaver County Children and Youth Services v. Funk*, 89 Pa. Commw. 226, 228 (1985).

Background evidence presented at hearing indicates that in March 1995, the Governor announced that the appointing authority agency would be dismantled and its essential functions transferred to other agencies. N.T. pp. 28-29. The legislature through Act 1996-58[2] abolished the appointing authority; the legislation renamed the former Department of Commerce as the Department of Community and Economic Development (DCED) and transferred the majority of the appointing authority's programs and duties to the renamed agency. Section 305(a) of Act 1996-58 established the following General Rule:

> The subjects of transfer from the Department of Community Affairs under this chapter are transferred to the Department of Community and Economic Development, the Pennsylvania Historical and Museum Commission, the Pennsylvania Emergency Management Agency and the Department of Transportation, respectively, with the same force and effect as if those subjects of

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additional documents as part of the record properly before us.

[2] "The Community and Economic Development Enhancement Act," Act of June 27, 1996, P.L. 403; 71 Pa.C.S.A. §§ 1709.101-1709.2106.

> transfer had originally belonged to or had been incurred or entered into by those entities.

71 P.S. § 1709.305(a). The phrase "subjects of transfer" is defined as

> Powers, duties, personnel, appropriations, allocations, documents, files, records, contracts, agreements, equipment, materials, orders, rights and obligations utilized or accruing in connection with functions transferred from one entity to another under this act.

71. P.S. § 1709.103. Under such language, the fact of the appointing authority's dissolution does not automatically moot this appeal; under such language, appellant, having been employed on programs transferred to DCED, any rights of return due appellant would be with DCED, not the now-defunct appointing authority.

In support of its action, the appointing authority presented the testimony of Karen Deklinski, its Deputy Secretary for Administration from Spring 1995 to the end of June 1996. N.T. p. 27. Deklinski testified that to implement the Governor's plan, she and other senior staff – including the appointing authority Secretary and the other Deputy Secretary – met with representatives of the Governor's Office of Administration, appointing authority employes, local government groups, non-profit associations, and the Governor's budget staff. Deklinski testified that they performed a thorough review of appointing authority programs. Deklinski testified that by October 1995, they had concluded that the appointing authority's programs could continue efficiently and effectively with a complement of 90-100 employes. N.T. pp. 29-38.

Appellant was employed at the appointing authority's Scranton Regional Office. Deklinski testified that based upon its review, the appointing authority concluded that the Weatherization Specialist duties performed by appellant could be absorbed by the appointing authority's Philadelphia Regional office. N.T. pp. 41-42. David Black, the appointing authority's other Deputy Secretary and for three months its Acting Secretary, corroborated Deklinski's testimony.

Mary Bernard, the appointing authority's acting Personnel Director at the time of the furlough, testified that appellant was the only Weatherization Specialist 2 employed at the Scranton Regional Office. N.T. p. 217. Bernard testified that appellant was furloughed in accordance with the applicable collective bargaining agreement. N.T. pp. 217-218.

The appointing authority also presented the testimony of Richard Zerbe, its Chief of Budget and Fiscal Management and the acting Director of its Bureau of Management Services from October 1995. N.T. p. 226. Zerbe testified that the appointing authority's proposed budget for the 1996-97 fiscal year contemplated the transfer of the appointing authority's functions to other agencies. N.T. pp. 228-230. Zerbe testified that Deklinski advised him of the number of positions to be included on complement. Zerbe testified that based upon the provided complement numbers, he developed projected salary costs for the authority's budget proposal. N.T. pp. 230-231.

Appellant has presented several arguments in opposition to the appointing authority's evidence. Either at

hearing or in his brief, appellant has asserted the following:

1) that there existed no lack of money justifying furlough;

2) that there existed no lack of work; and,

3) that age-based discrimination affected the implementation of furlough.

Based upon our review of the record, none of appellant's arguments can prevail.

Before we examine appellant's evidentiary challenges, we must first address two additional arguments presented by the appellant in his brief. First, appellant asserts a denial of due process stemming from the appointing authority's May 28, 1996, written notice of furlough due to a lack of funds. Appellant claims that the appointing authority, having instead premised its evidence at hearing upon a lack of work argument, he was unprepared to defend on that new issue. Ap. Bf. pp. 10-19.

The appointing authority in its Reply Brief argues that the written notice does not set forth a lack of funds as the basis for furlough; the appointing authority contends that the letter merely advised the appellant that his position would not be funded. AA Reply Bf. pp. 6-7. The appointing authority argues that since there exists no requirement that an employe be advised whether lack of funds or lack of work was the basis for furlough, its notice to appellant was adequate. AA Reply Bf. pp. 7-9. Additionally, the appointing authority claims that appellant received actual notice of the lack of work basis for

furlough by attending a Commission hearing on the furlough of another appointing authority employe conducted two days prior to his own. AA Reply Bf. pp. 10-12.

The appointing authority's May 28, 1996, furlough notification letter states, in pertinent part:

> The section of the proposed Commonwealth budget for fiscal year 1996-1997 relevant to the Department of Community Affairs, provides funding for one hundred positions. Since there has been no funding proposed to support the current complement, your position will not be funded. It is necessary to furlough you from your regular Civil Service Weatherization Specialist 2 position effective the close of business June 28, 1996.

Comm. Ex. A, p. 1. In our opinion, the phrase "your position will not be funded" indicates a lack of funding; appellant's belief that said lack of funds was the basis for his furlough was clearly reasonable. While we agree that the letter was poorly constructed, we note that it adequately advised appellant of the fact of his furlough; such advice is the sole standard by which the sufficiency of furlough notice is to be determined. *See Eastern Pennsylvania Psychiatric Institute, Department of Public Welfare v. Russell, et al.*, 77 Pa. Commw. 390, 400 (1983). Appellant's argument is, therefore, rejected.

Appellant bases his second preliminary argument, alleging a lack of a fair hearing, upon several assertions including:

1) lack of notice sufficient for appellant to determine and bring the witnesses and evidence necessary to defend his claims (Ap. Bf. pp. 19-20);

2) the use, by appointing authority counsel, of suggestive and leading questions (Ap. Bf. pp. 20-22);

3) the Hearing Officer's acceptance of objections, by appointing authority counsel, to appellant's questions concerning post-furlough conditions – despite counsel's own questions raising similar issues (Ap. Bf. pp. 22-23);

4) coaching, by having later witnesses present and listen to earlier witnesses' testimony (Ap. Bf. pp. 23-24); and

5) uncorroborated hearsay and speculation by appointing authority witnesses. Ap. Bf. pp. 24-28.

The appointing authority, in response, has asserted that counsel's questions were not leading and that is content to stand on the record. AA Reply Bf. pp. 12-14.

Appellant's arguments in this matter are not persuasive. We have closely reviewed the record compiled at hearing and conclude that the Hearing Officer's rulings were correct. Appellant was asked at hearing whether he intended to represent himself; he responded in the affirmative. N.T. pp. 6-7. In our opinion, each of appellant's arguments is the direct result of his own election to appear without legal counsel. A request for continuance due to surprise or to obtain additional witnesses, a motion for the sequestration of witnesses, or objections to

leading questions by appointing authority counsel are examples of the avenues of recourse available to any party during hearing; these avenues were not taken by appellant. Appellant's waiver of his right to counsel was voluntary and knowing. *See e.g. Novak v. Commonwealth, Insurance Department,* 106. Pa. Commw. 232, 237 (1987). Appellant cannot, post-hearing, raise objections or challenges which should have been made prior to or during the hearing. Appellant having elected to represent himself cannot now under the guise of "fair hearing" reexamine his choice.

Returning now to appellant's evidentiary arguments, we note that appellant's contention that no lack of money existed is premised upon the fact that his position was paid through federal funds which remained available following his furlough. Ap. Bf. pp. 3-5, 9-10. However, since the appointing authority primarily premised the furlough upon the lack of work caused by its reorganization, appellant's argument, even if accepted, would not be sufficient to overcome the appointing authority's presentation. *See, Commonwealth, Department of State v. Stecher,* 506 Pa. 203 (1984).

The appellant next argues that no lack of work was shown. The Supreme Court of Pennsylvania in *Stecher* established a three-step standard under which lack of work claims are to be reviewed:

1) that a position was in fact eliminated;

2) that the position was eliminated as part of a reorganizational streamlining; and,

3) that management acted in a good faith belief that the reorganizational streamlining would lead to greater efficiency.

506 Pa. at 210. Appellant asserts that the appointing authority: 1) failed to demonstrate the necessary good faith belief; and, 2) failed to demonstrate greater efficiency resulting from the elimination of his position. Ap. Bf. pp. 32-49.

In support of his assertion of lack of good faith, appellant relies upon the following arguments:

1) that the appointing authority had originally notified him of furlough due to lack of funds;

2) that the monitoring duties formerly performed by him were still being done;

3) that the Office of Administration, rather than his appointing authority, wanted him furloughed;

4) that the appointing authority failed to conduct an in-depth study;

5) that he was not one of the 97% of furloughed employes recalled to the appointing authority; and,

6) that the appointing authority violated the collective bargaining agreement.

Ap. Bf. pp. 32-37. Appellant's first argument is, as noted previously in this adjudication, irrelevant to a lack of work furlough.

Appellant's second charge is dismissed. The appointing authority has presented evidence demonstrating that

appellant's former duties have been reassigned to its Philadelphia Regional Office. The reassignment of such duties is a matter within the appointing authority's managerial discretion. *Stover v. Department of Environmental Resources*, 161 Pa. Commw. 325, 329 (1994). Nothing presented by appellant would lead us to believe that the appointing authority improperly exercised that discretion.

Appellant's third assertion is based upon a misreading of testimony. Appellant cites testimony by Black (N.T. pp. 114-115) to the effect that during the appointing authority's review, the Office of Administration recommended that appellant's position be eliminated. Ap. Bf. pp. 33-34. Appellant specifically ignores Black's earlier testimony that the appointing authority was not bound by the Office of Administration's recommendations. N.T. pp. 111-112. While the appointing authority witnesses, by their many references to Office of Administration assistance, have clearly attempted to absolve themselves of some responsibility, it is apparent from the record that the ultimate determination of which positions would be eliminated was made by the appointing authority. Black, Deklinski, and Dennis Darling all testified to reasons for the appointing authority's acceptance of the recommendation to eliminate appellant's position. N.T. pp. 41-43, 76-80, 123-127, 149-151, 170-174. Such testimony clearly establishes that the appointing authority, itself, chose to eliminate appellant's position.

Appellant has presented no evidence to establish his fourth charge. Instead, appointing authority witnesses

have testified, without refutation, that a thoughtful, careful review of appointing authority programs was conducted. N.T. pp. 32-34, 76, 80, 90-91. Accordingly, appellant's argument is dismissed.

Appellant's fifth argument is again based upon a misinterpretation of clear testimony. On cross-examination by appellant, Bernard distinguished between the terms "recalled" and "placed." N.T. pp. 219-222. Her distinction was initially made on direct examination during which she noted that "recall" referred to a furloughed employe's right to return to the same position with the same appointing authority. N.T. pp. 212-213. The term "placement" clearly complemented "recall" by referring to employment in other positions with other agencies. N.T. pp. 213-216. Appellant does not refute Bernard's testimony that only seven individuals were recalled, the remainder of the 97% were apparently placed somewhere outside of the appointing authority. N.T. p. 220. Nothing presented by appellant indicates that the recalls or placements were in any way effected improperly or in a manner disadvantageous to appellant.

Appellant's sixth argument involves the interpretation of a document which has not properly been placed before us; we, therefore, cannot deem the argument valid to support *any* ruling. These arguments are not, in our opinion, probative of a lack of good faith; appellant's arguments are, therefore, dismissed.

Similarly, we dismiss appellant's argument asserting that the appointing authority failed to establish increases in efficiency due to the elimination of appellant's position. It has been left to each appointing authority, not this

Commission, to determine the level of performance acceptable in the conduct of its responsibilities. *Commonwealth of Pennsylvania, Department of Public Welfare v. Magrath*, 14 Pa. Commw. 257 (1974). As acknowledged by appellant, the appointing authority continues to perform the reviews previously conducted by appellant but has adopted "a lesser scale." Ap. Bf. p. 33. The Commission cannot require that an appointing authority perform its duties well or thoroughly; such decisions are solely within the discretion of an appointing authority.

It is an appellant's burden to present evidence sufficient to establish his claims of discrimination. *Commonwealth, Department of Community Affairs v. Colston*, 104 Pa. Commw. 159, 163 (1987). The current appellant has alleged discrimination due to his age.[3] Appellant's claim is premised solely upon the fact that the appointing authority at other locations retained younger employes with less seniority than appellant. Such evidence does not, by itself, constitute the required affirmative evidence demonstrating an intent by the appointing authority to discriminate against appellant. *Commonwealth, Department of Health v. Graham*, 58 Pa. Commw. 409, 411-412 (1981); *Pronko v. Commonwealth, Department of Revenue*, 114 Pa. Commw. 428, 440 (1988). The appointing authority has also presented unrefuted credible evidence demonstrating that the younger employes were assigned to different furlough units than appellant. Appellant's allegation of discrimination is, therefore, dismissed.

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[3] Appellant, at hearing, withdrew an additional allegation of discrimination based upon political affiliations or beliefs. N.T. pp. 291-293.

Based upon the above review, we enter the following

CONCLUSIONS OF LAW

1. The appointing authority has presented evidence establishing a lack of work sufficient to justify furlough under Section 802 of the Civil Service Act, as amended.

2. The appellant has failed to present evidence establishing discrimination violative of Section 905.1 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of William G. McAndrew challenging his furlough from regular Weatherization Specialist 2 employment and sustains the action of the Department of Community Affairs in the furlough of William G. McAndrew from regular Weatherization Specialist 2 employment, effective at the close of business June 28, 1996.

State Civil Service Commission

/s/ Charles J. Lieberth
Charles J. Lieberth
Chairman

Mailed: October 27, 1998

MANAGEMENT DIRECTIVE

Commonwealth of Pennsylvania
GOVERNOR'S OFFICE

580.11 Amended
Number

Subject:

Documentation of classified Service Personnel Actions

By Direction of:

/s/ John E. Millett
John E. Millett, Executive Director, State Civil Service Commission

Date:

June 19, 1988

States documentation requirements for notification of classified service employees for specific personnel actions and their appeal rights, where applicable. Contains minor changes only.

1. SCOPE. Applies to all classified service employes in State agencies identified in Section 3(d), Civil Service Act of August 5, 1941, P.L. 752, as amended, and political subdivisions of the Commonwealth which have contracts with the State Civil Service Commission (SCSC) for services and facilities as provided for in Section 212, Civil Service Act.

2. POLICY.

a. Advance written notification shall be furnished classified service employes for personnel actions listed in Enclosure 1. Such advance notice must be at least one workday, except in circumstances of unusually serious infraction, where continued employment would be detrimental, or unless a longer period of time is specified for the particular action by the Executive Director, SCSC. Exceptions: for acceptance of resignations, voluntary or by abandonment of position, and suspensions, the written notice shall be furnished the employe not later than ten workdays after the effective date of the action.

b. Notices must provide the reason(s) for the action being taken and appeal rights, if appropriate. Include ***Appeal Request***, Form SCSC-4112, when appeal rights apply. See Enclosure 2.

c. Notices shall be signed personally by the appointing authority or designated subordinate(s). When this responsibility has been delegated, the delegation must follow a rational line of responsibility and be in writing and available for inspection. Subordinates properly delegated signatory authority shall not further delegate that authority. The signature element on written notices for which delegation has occurred will be structured as follows:

John Q. Doe (signature)
JOHN Q. DOE (typed name)
Personnel Officer (title)
For:
SAM E. EXPERIMENTAL
Secretary of Department XYZ

d. Each agency shall provide the director, SCSC, with a copy of the written delegation of signatory authority for the actions identified in Enclosure 1, as well as for the following documents: ***Personnel Authorization***, Form STD-360B, or ***Report of Personnel Transactions for Non-State Employes***, Form SCSC-100, as applicable; ***Unqualified Recommendation for Promotion***, Form SCSC-5223.

e. Service References. Section 950, Civil Act; 4 Pa. Code Sections 95.7, 95.8, 95.26, 97.38, 99.26, 99.42, 101.54, 105.1, 105.2, and 105.3; Management Directives 580.8, 580.16, 580.20, 580.24, 580.26, 580.28, and 580.30; and applicable collective bargaining agreements or memoranda of understanding.

3. PROCEDURES.

a. For the specific personnel action, prepare the notice and supporting documentation identified in Enclosure 1.

b. When applicable, attach copies of ***Appeal Request***, Form SCSC-4112 to the notice. Form SCSC-4112 may be obtained from the Office Services Division, SCSC, Room B-08, South Office Building (P.O. Box 569, Harrisburg, PA 17120, for U.S. Postal Service deliveries). Non-PANET telephone: 717/787-5632; PANET users: 447-5632. Appointing authorities are encouraged to replenish stock by use of their own reproduction facilities.

c. Forward SCSC copy of the notice to the Bureau of Audit and Technical Services, SCSC, 3d Floor,

State Street Building (P.O. Box 569, Harrisburg, PA 17120, for U.S. Postal Service deliveries).

2 Enclosures:

1 – Guidelines for Documentation of Personnel Actions

2 – *Appeal Request,* Form SCSC-4112

This amended version replaces in its entirety Management Directive 580.11, amended September 24, 1981.

GUIDELINES FOR DOCUMENTATION OF PERSONNEL ACTIONS

GENERAL:

(1) All written notices shall include the employe's name, social security number (SSN), and effective date of action. The SSN shall be placed in the upper right hand corner unless a labeled space has been provided.

(2) In addition to the required documentation listed below, written notices should include other information appropriate to the specific personnel action.

(3) Written notices wherein employes are informed of their appeal rights in adverse personnel actions must be framed in a manner which enables the employe to discern the nature of the charges. Notices determined to be defective may result in reversal of the personnel action. As appropriate, grievance rights under applicable labor agreements also should be referenced.

(4) Whenever possible, the SCSC copy of the written notice should be attached to the *SCSC* copy of the ***Personnel Authorization***, Form STD-360B, or ***Report of Personnel Transactions for Non-State Employees***, Form SCSC-100, as applicable.

ACTION	DOCUMENTATION
Appointment	Notice to appointee shall state where to report, salary, increment eligibility date, job title, bargaining unit if applicable, and civil service status and conditions thereof as follows:
	(1) **Emergency.** State that employment will be terminated on or before a specified date, not to exceed 30 workdays, unless extended with SCSC approval for a period not to exceed 30 workdays.
	(2) **Temporary.** State that employment is for a specified period, and is to terminate on or before a specified date, which must be less than six months.
	(3) **Provisional.** Appointment letter must include the conditions of employment found in Management Directive 580.16. It must be accompanied by a copy of ***Working Test Period – What is it?***

State that the employe's name will be removed by the SCSC from the eligible list for the job title.

(4) **Probationary.** State length of probationary period, and that the employe's name will be removed by the SCSC from the eligible list for the job title and placed in the inactive file for all equal and lower level job titles.

(5) **Probationary for substitute and limited term employes.** State the length of employment and that employe must serve a probationary period. If satisfactory, the employe will receive regular status. Inform employees of their employment rights. If separated while in:

(a) probationary status, they may be returned to the eligible list; or

(b) regular status, they have reinstatement rights.

(6) Qualifier. State type of qualifying examination (whether competitive or noncompetitive), the method by which probationary or regular status will be assigned, and conditions for continued

employment. Reference 4 Pa. Code Section 95.8.

Promotion — Notice to employe shall state where to report, supervisor, new salary, applicable change in increment eligibility date, new job title, change in bargaining unit if applicable, length of probationary period, and right of return to previously held position pursuant to 4 Pa. Code Section 97.38 and Management Directive 580.26.

Also state that the SCSC will remove the employe's name from the eligible list for the job title and place it in the inactive file for all equal and lower level job titles.

Reassignment — Notice to employe shall state reason(s), where to report, supervisor, new job title and/or change in collective bargaining unit if applicable, salary, civil service status and conditions thereof, and right of return to previously held position pursuant to 4 Pa. Code Section 99.26 and Management Directive 580.26.

APPLICABLE FOOTNOTES

A

Demotion, Voluntary — **Employe's written request.** Appointing authority's written approval shall state where to report, supervisor, new job title, salary, civil service status and

conditions thereof, and change in bargaining unit if applicable. Inform probationary status employees that their names may be restored to employment eligible lists by submitting a written request to the Director, SCSC.

APPLICABLE FOOTNOTES

A

Demotion, involuntary

Notice to employe shall state in detail reason(s), right of appeal, where to report, supervisor, new job title, salary, civil service status, and change in bargaining unit if applicable. Inform probationary status employees that their names may be restored to employment eligible lists by submitting a written request to the Director, SCSC.

APPLICABLE FOOTNOTES

A, B & C

Reallocation to a Lower Class

Notice to employe shall state reason, right of appeal, where to report, supervisor, new job title, salary, civil service status, and change in bargaining unit if applicable. Inform probationary status employees that their names may be restored to employment eligible lists by submitting a written request to the Director, SCSC. Reference Management Directive 580.28.

APPLICABLE FOOTNOTES

A&B

Suspension Notice to employe shall state in detail reason(s), right of appeal, job title, civil service status, number of workdays involved, and date of return. For suspensions under **4 pa. Code Section 101.21(b)**, also inform the employe: "Where the investigation has not revealed cause for disciplinary action, the suspension shall be retracted and expunged from all records, with the employe receiving back pay for the full period of suspension," and "Where the investigation has revealed cause for disciplinary action, the suspension shall be converted, either in whole or in part, to a disciplinary action."

APPLICABLE FOOTNOTES

B, C&D

Removal FROM THE CLASSIFIED SERVICE. Notice to employee shall state in detail reason(s), right of appeal, job title, and civil service status. Attach a copy of the employe's written response if one has been made.

APPLICABLE FOOTNOTES

B&C

FROM PROBATIONARY STATUS AFTER PROMOTION. Notice to employe shall state reason(s) for removal, right of appeal, job title, civil service status, and that the employe is to be returned to the previously held position and civil service status. If removal is to be from the classified service the employe shall be separated from the position and status held prior to promotion.

APPLICABLE FOOTNOTES

B&C

Resignation, Voluntary

Employe's resignation showing handwritten date submitted, date of resignation, and signature. The appointing authority's acceptance letter shall state job title, civil service status, and inform regular employees of eligibility for reinstatement from resignation pursuant to **4 Pa. Code Section 101.54.** Inform probationary status employes that their names may be restored to employment eligible lists by submitting a written request to the Director, SCSC.

APPLICABLE FOOTNOTES

D

Resignation, Abandonment	Notice to employe shall state in detail reason(s), right of appeal, job title, and civil service status.

APPLICABLE FOOTNOTES

B, C&D

Retirement, Voluntary	Employe's resignation for retirement purposes, showing handwritten date submitted, date of resignation, and signature.
Retirement, Involuntary	Notice to employe shall state in detail reason(s) and right of appeal. It shall be issued by the Director, SCSC, after determination that documentation from the appointing authority proves the employe unfit for efficient performance of duties.

APPLICABLE FOOTNOTES

B & C

Furlough.	Notice to furloughee shall include job title and civil service status, and shall state reason(s) and right of appeal. Inform probationary status employees that their names may be restored to employment eligible lists by submitting a written request to the Director,

SCSC. The appointing authority will send to the SCSC notification of employees furloughed in job titles subject to the furlough provisions of:

(1) **The Civil Service Act.** (a) The notification shall be a memorandum transmitting a completed *Application For Reemployment After Furlough,* Form SCSC-1 R, for each fourlouhgee with reemployment rights. (B) A separate notification shall be submitted for probationary status furloughees who did not hold regular status immediately prior to their probationary appointments. It shall include each employe's full name, SSN, job title from which furloughed, and effective date.

(2) **Applicable collective bargaining agreements or memoranda of understanding.** The report shall include each employe's full name, SSN, job title from which furloughed, and effective date of furlough.

APPLICABLE FOOTNOTES

B & E

Transfer, Interagency

SCSC copy of completed *Personnel Transfer Request,* Form STD-320, and an approved *Authorization to Fill a Classified Service Position,* Form SCSC-5206. Notice to employee shall state reason(s), where to report, supervisor, job

title, salary, civil service status and conditions thereof, and right of return to previously held position pursuant to 4 Pa. Code Section 99.26 and Management Directive 580.26.

Include Information relative to civil service status, as applicable. If in:

(1) regular status, will retain such status in the new position;

(2) probationary status, shall continue to serve the remainder of the probationary period, unless the gaining agency requires that a full probationary period be served.

Leave of Absence Without Pay

Employe's written request and appointing authority's written approval, stating starting and ending dates of leave, job title, and civil service status. The approval also will include information on reemployment rights as set forth in Management Directive 580.30.

For extension of leave, employe's written request and appointment authority's approval, stating new leave ending date.

Reinstatement

Notice to reinstatee shall state when and where to report, salary, increment eligibility date, job title, bargaining unit if applicable, and civil service status and conditions thereof.

Extension/ Reduction of Probationary Period	Enter in the remarks section of the performance evaluation report the applicable message shown in Management Directive 580.8.
Performance Evaluation	Completed performance evaluation report.
Compensation Changes	Notice to employe shall state both current and new salary. Copies of these notices are not to be submitted to the SCSC. The SCSC will regard Forms STD-360B or SCSC-100 as meeting its notification requirement.
Classified Service to Non-Classified Service	Refer to the documentation requirements for Volutary Resignation or Leave of Absence Without Pay, as applicable. One of these actions must occur if the employe is to have the opportunity for reemployment in the classified service. Exception: classified service employes entering the Senior Management Service (SMS) need not request a leave of absence. However, the notice to such employees of their appointment to the SMS position must state that leave has been granted pursuant to 4 Pa. Code Sections 101.61(c) and 101.62(d).
Non-Classified Service to Classified Service	Refer to the documentation requirements for Appointment or Reinstatement, as applicable. Employes also may enter the classified service with qualifier status or probationary status pursuant to 4 Pa. Code Sections 95.7(d)(4) and 95.8.

The notice to the employe shall include all items required for Appointment and cite the pertinent authority for the action.

FOOTNOTES

A. Include Information relative to civil service status, as applicable, if in:

(1) Regular status, will retain such status in the new job title or position, unless demoted or reassigned to a trainee job title. Such employees will be assigned probationary status and have right to return to previous job.

(2) Probationary status, continue to serve the remainder of the probationary period. However, the probationary period may be extended to provide adequate opportunity for the employe to demonstrate competency.

B. Provide two copies of *Appeal* Request, Form SCSC-4112. Include the following in the written notification to each employe: "Your rights in this personnel action are explained in Parts II and III of *Appeal Request,* Form SCSC-4112, copies of which are attached." Appointing authorities shall give the written notification directly to each employe and obtain the employe's signed and dated acknowledgement. As an alternative, appointing authorities may forward written notifications to employes by U.S. Postal Service Certified Mail – Return Receipt Requested. A photocopy of the signed and dated acknowledgement or return receipt (PS Form 3811 or like version) will accompany the copy of the written notification furnished to the SCSC.

C. Include a clear, detailed statement of the reason(s) for the action, sufficient to inform the employe of the grounds upon which it is based. Identify the specific tasks, responsibilities, or behavior in which the employe

has been found deficient. In the case of misconduct, sufficient details including when, where, or with whom the incident(s) occurred must be stated in order to enable the employe to fully understand the basis for the charges. If the action is appealed, the SCSC will hear arguments only on the charges which have been identified as the cause for the action.

D. The notice must be given the employe not later than ten workdays after the effective date of the action.

E. The notice must include information relative to reemployment under the Civil Service Act (refer to **Management Directive 580.20** for details), or recall under collective bargaining agreements or memoranda of understanding (refer to applicable agreement or memorandum for details). Inform each probationary status furloughee who did not hold regular status immediately prior to their probationary appointment that the SCSC will automatically restore their name to eligible lists if their eligibility thereon has not expired.

[LOGO]

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF COMMUNITY AFFAIRS
HARRISBURG
17120

THE SECRETARY

May 28, 1996

Mr. William McAndrew
813 Delaware Street
Scranton, PA 18509

Dear Mr. McAndrew:

The section of the proposed Commonwealth budget for fiscal year 1996-1997 relevant to the Department of Community Affairs, provides funding for one hundred positions. Since there has been no funding proposed to support the current complement, your position will not be funded. It is necessary to furlough you from your regular civil Service Weatherization Specialist 2 position effective the close of business June 28, 1996.

Your name will be placed on the appropriate recall lists in accordance with Article 30 of the AFSCME Master Agreement. In addition, for a six month period after furlough, the Commonwealth will attempt to place you in an available position for which you would qualify in accordance with the procedure of Article 30.

If you have already completed and submitted Civil Service and non-Civil Service Applications and placement form as a result of the pre-placement agreement, your paperwork will be automatically converted to conform with the contractual placement process. If you have

not, you must complete these forms as soon as possible to be placed on all possible recall lists.

You will be scheduled for counseling with Personnel Office staff. During this session, you will be provided with more detailed information about Group Life Insurance, medical coverage benefits, and payment for leave. Retirement counseling regarding the return of your contributions or, if eligible, receipt of benefits may be obtained from your area office of the State Employes' Retirement System by calling 1-800-633-5461.

Also enclosed is a Location of Records for Unemployment Compensation form. In the event you file a claim for unemployment compensation, you must take this form to the local office. A determination of your right to receive benefits will be made by the local office of the Office of Employment Security.

The Federal Law (Consolidation Omnibus Budget Reconciliation Act of 1985 – COBRA) requires employers who are sponsoring group health plans to offer employes and their families the opportunity for a temporary extension of health care coverage at group rates in certain instances where coverage under the plan would otherwise end. Since you are an employe covered by the Commonwealth's State Employe Health Program, you may have a right to choose continuation coverage. If eligible, the Pennsylvania Employes Benefit Trust Fund will provide you with additional information about available COBRA continuation coverage in the near future.

If you were designated either a "public employe" or "public official" as defined by the State Ethics Act while employed with the Department, you were required by act

170 to file an annual financial disclosure statement. In addition, certain requirements and restrictions apply to **former** "public employes" and "public officials" as detailed on the enclosed sheet. Specific questions and further information regarding these requirements and/or restrictions should be directed to the State Ethics Commission at 717-783-1610.

You have the right to appeal this action through the union grievance procedure as described in Article 38 of the Master Agreement between the Commonwealth and the American Federation of State, County, and Municipal Employes.

Your Civil Service rights in this personnel action are explained in Parts II and III of the enclosed Appeal Request, Form SCSC-4112.

Any questions may be directed to Jane Bernard, Personnel Director at 717-787-5006.

Sincerely,

/s/ David E. Black
David E. Black
Acting Secretary

Enclosures

cc: Deputy Secretary Deklinski
Civil Service Commission
Bureau of Labor Relations
AFSCME Council 13
Furlough File
Personal History File